SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1598

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BELL AEROSPACE COMPANY DIVISION OF TEXTRON, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE IN SUPPORT OF THE RESPONDENT.

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The Chamber of Commerce of the United States of America (herein the "Chamber") respectfully moves this Court for leave to file a brief *amicus curiae* in support of the position urged herein by the respondent, Bell Aerospace Company Division of Textron, Inc. In support whereof, the following is shown:

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in

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INTEREST OF THE AMICUS CURIAE.

The interest of the Chamber of Commerce of the United States of America is set forth in the foregoing Motion for Leave to File a Brief *Amicus Curiae* herein.

SUMMARY OF ARGUMENT.

I.

Prior to the enactment of the Taft-Hartley amendments, the National Labor Relations Board's policy was to exclude "managerial" employees from the statutory right to organize under the National Labor Relations Act. This practice was one of total exclusion, for the Board never granted personnel it found to be "managerial" the statutory right to engage in collective bargaining with their employer. Moreover, this exclusionary practice was not limited only to those managerial personnel who were involved in the formulation of their employer's labor relations policies, but extended to those involved in purely business and commercial matters as well.

During the same period, however, the Board allowed foremen and supervisors to form unions and collectively bargain with their employer. Congress found that this practice was contrary to the policies of the Act, and in 1947, amended the Act to exclude "supervisors" from its protection. However, Congress had no reason to quarrel with the Board's described practice of excluding other managerial personnel because that practice comported with the policy and principle of maintaining and preserving within the Act management's legitimate right to manage.

After the Taft-Hartley amendments, the Board continued to exclude *all* "managerial" employees from the Act's coverage holding that such exclusion was consistent with the will of Congress. In the instant case, however, the Board has taken the position that managerial personnel are not excluded from the Act's coverage unless their duties might involve a conflict of interest between their obligation to the employer and their loyalty to the bargaining unit and that this conflict can only

arise if the persons at issue are involved in labor relations or personnel matters. According to the Board's view, all other managerial personnel are included within the Act's coverage.

The Board's new and revised position is contrary to its own past practice, Congressional intent and sound principles of labor-management relations pursuant to which persons charged with the creation and effectuation of management policies, whether labor relations oriented or not, must have a sole, undivided allegiance to management.

II.

Although the Board enunciated a new and erroneous policy with respect to its treatment of "managerial" employees in this matter, it was not precluded from doing so in an adjudicatory proceeding, rather than through rule-making hearings, as the court below concluded. Rule-making is not the most appropriate procedure for resolving the issue herein because any rule that might result would be incapable of dealing with the multitude of factual situations in which the issue might present itself. That is, rule-making would result in no substantial judicial or administrative economy. *Ad hoc* litigation is the satisfactory way of resolving such an issue.

Moreover, this case is governed by *N. L. R. B.* v. *Wyman-Gordon Co.*, 394 U. S. 759 (1964) wherein this Court held that the Board was not precluded from formulating a rule in an adjudicatory proceeding so long as the Board applied the rule to the parties to that proceeding and not just prospectively. The rule enunciated in this case, however erroneous, was formulated in an adjudicatory proceeding affecting the parties to this proceeding.

ARGUMENT.

I.

MANAGERIAL PERSONNEL ARE NOT COVERED BY THE NATIONAL LABOR RELATIONS ACT; THE BOARD'S CONTENTION THAT SUCH PERSONNEL ARE "EMPLOYEES", ENTITLED TO THE RIGHT OF SELF-ORGANIZATION CONFERRED THEREIN IS CONTRARY TO THE BASIC POLICIES AND PURPOSES OF THE ACT.

In this case[1] the Board determined that buyers employed by Bell Aerospace Company, Division of Textron, Inc., constituted a unit appropriate for collective bargaining purposes and, upon petition by a union, were subject to the Board's procedures. While the Board did not disagree that the buyers in question might well be "managerial" employees, it nevertheless concluded that managerial personnel were "employees" covered by the Act. The rule enunciated and applied by the Board was that "managerial" employees are so covered by the Act unless their duties and responsibilities "include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." The Board found no such conflict herein and ordered the Employer to bargain with the labor organization representing the unit of buyers.

The Court of Appeals for the Second Circuit denied enforcement of the Board's order.[2] The Court concluded that all true "managerial" employees were excluded from coverage by the

1. The Board's order in the underlying representation case is reported at 190 NLRB No. 66 (1970); its Order denying reconsideration is reported at 196 NLRB No. 127 (1972); and its Decision and Order putting into issue the question here under consideration is reported at 197 NLRB No. 30 (1972).

2. 475 F. 2d 485 (CA 2, 1973).

Act, and found that the exclusion was not limited to the "conflict of interest" test as contended by the Board, but embraced any person who is involved in "formulating, determining and effectuating his employers' policies or has discretion, independent of an employer's established policy, in the performance of his duties."

The issue which thus separates the Board from the Second Circuit relates to the kind of managerial personnel exempt from the Act. In satisfaction of its own test, the Board would exclude only those who formulate or effectuate their employer's labor or employment policies; the court would additionally exclude those who act for their employer in purely business respects unrelated to matters of labor policy or labor relations, such as the buyers involved herein.

Analysis of the history of the Board's own policy with respect to managerial personnel reveals the error the rule enunciated by the Board in this matter. That history reveals that, until this instant case, the Board has never accorded "managerial" employees bargaining rights under the Act, and nothing that Congress has said remotely suggests approval of the Board's present interpretation of its policy.

A. Board Policy Prior to the Taft-Hartley Amendments.

Though the Wagner Act nowhere contains the term "managerial employee", the Board, as a matter of policy, has consistently excluded personnel it found to be within that category from coverage under the statute. Moreover, the Board excluded such personnel because their duties encompassed formulation, determination and effectuation of their employers' policies or because they had independent discretion in the performance of their duties. The exclusion was not restricted to only those who formulated or enforced labor or personnel policies.

As observed by the Court below, the concept of "managerial employee" first arose in the context of cases in which either the

employer or the union argued that certain personnel should be excluded from proposed larger bargaining units because, as a result of their duties, those persons were in a close relationship with management. Thus, for example, in *Julian P. Friez & Sons*, 47 NLRB 43 (1943), the Board excluded from a unit of production and maintenance employees, personnel charged with expediting the completion of orders and assuring adherence to production time schedules because they were "closely related to management".

In *Spicer Mfg. Corp.*, 55 NLRB 1491 (1944), expeditors who contacted vendors, placed orders, kept records of the progress of deliveries and had authority to reassign orders, were excluded from a unit of office clerical, technical and professional employees because "the authority possessed by these employees to exercise their discretion in making commitments on behalf of the Company stamps them as managerial.[3] Buyers such as those involved herein were similarly excluded from the statutorily-recognized right of self-organization. Thus, in *Hudson Motor Car Co.*, 55 NLRB 509 (1944) buyers were excluded from a clerical unit since they purchased "all materials required by the Company and were, therefore, 'closely allied to management.' "

Similarly, in *Vulcan Corp.*, 58 NLRB 733 (1944) a buyer was excluded from a production and maintenance unit because the responsibility of his position placed him within the "managerial" category.[4]

Analysis of the Board's practice under the Wagner Act thus reveals that the Board excluded personnel from the rights of Union representation because their duties and responsibilities categorized them as "managerial", and that the exclusionary practice was not restricted only to those who had responsibilities in the area of labor relations.

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3. See, also, *Rex Mfg. Co., Inc.*, 7 NLRB 95 (1938); *Westinghouse Air Brake Co.*, 64 NLRB 547 (1945); *Electric Controller & Manufacturing Co.*, 69 NLRB 1242 (1946).

4. See, also, *Barrett Division, Allied Chemical & Dye Corp.*, 65 NLRB 903 (1946).

The Board now views its early practice differently. It contends that it never excluded "managerial employees" from the Act's coverage. Rather, it is argued, such personnel were only excluded from joining rank and file bargaining units either because they did not share a sufficient "community of interest" with the rank and file or because they had confidential relationship with the employer in matters concerning labor relations. These arguments are novel and constitute an attempt to retroactively restructure a "policy" to conform to its current view. There arguments do not withstand analysis.

The Board's first argument—that from the inception of the Act "managerial employees" were not excluded from the Act's coverage but were merely excluded from rank and file units because they lacked a sufficient community of interest with larger groups—is based upon occasional implication and dicta contained in a few cases that such personnel might still be "employees" within the meaning of the Act,[5] and is without merit.

The Board has never found a unit of managerial personnel appropriate. It can hardly be maintained that the failure in practice to find that such personnel are entitled to Union representation constitutes a policy requiring approval of the Board's present view. In *N. L. R. B.* v. *Wheeling Electric Co.*, 444 F. 2d 783 (CA 4, 1971), the Board maintained that "confidential" employees were entitled to the Act's protection. There, as here, the Board argued that its policy was merely to exclude the personnel in issue from rank and file bargaining units, but that such personnel were still "employees". The Court observed that although the Board had, in earlier cases, implied that confidential employees might be covered by the Act, the Board had never certified a bargaining unit made up entirely of them. In response to the Board's contention, the Court stated:

5. See *Atlantic Greyhound Corp.*, 7 NLRB 1189 (1938); and *Dravo Corp.*, 54 NLRB 1174 (1944), where the Board specifically stated that it was not considering the relationship between the excluded expediters and buyers and management in making its decision. The reference to the existence of their rights to self-organization under the Act was pure dictum.

> "Simply saying, as the Board does, that confidential employees have always been given the right to self-organization in spite of their exclusion from bargaining units does not answer the question." *Id.*, at 786.

Moreover, the same argument was urged on the Court of Appeals for the Eighth Circuit with respect to "managerial employees" and similarly was rejected. *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602 (CA 8, 1971).

The Second Circuit's observation in *Wheeling* raises a sound challenge which the Board's argument here cannot overcome. If, as the Board contends, its pre-Taft-Hartley policy was merely to exclude managerial personnel from the rank and file, why then has it never found a separate unit of "managerial employees" appropriate in and of itself? If the Board's policy were then as it now contends that it was, it would have been able to find a separate unit of those employees appropriate. Even if managerial personnel lacked a sufficient community of interest to be included within a broader unit, they certainly would constitute an appropriate unit themselves. "Community of interest" would not bar such a unit.

However, in *Yale & Towne Mfg. Co.*, 60 NLRB 626 (1945), the Board specifically found that since the duties and responsibilities of certain time-study personnel made them "managerial", they "should neither be included in a unit with other employees *nor established in a separate unit.*" *Id.*, at 628-9.[6] Therefore, the Board can hardly maintain in retrospect that the mere lack of "community of interest" as between two groups of covered employees was in fact the Board's pre-Taft-Hartley policy. Rather, "managerial employees" were not accorded the right to self-organization precisely because they formulated or enforced management policies or exercised discretion in the performance of their duties.

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6. *Yale & Towne* was overruled in *Ford Motor Company*, 66 NLRB 1317 (1946), discussed *infra* on the basis of the Board's factual determination in *Ford* that time study personnel were not truly "managerial". The holding in *Ford*, however, does not reflect an abandonment of the policy statement expressed in *Yale & Towne*.

Further, the Board's argument that its early policy supports its present view of excluding from the Act's coverage only those managerial persons who formulate or effectuate labor or personnel policies is demonstrably in error.

First, the Board in its brief to this Court, acknowledges that its pre-Taft-Hartley policy excluded managerial employees who were not necessarily concerned with labor relations.[7] This is supported by Board decisions,[8] and it can hardly be denied by the Board now that its policy then contained the restriction it here urges.

Second, shortly before the 1947 amendments, the Board had occasion to review its policy concerning both "managerial employees" and "confidential employees" in *Ford Motor Co.*, 66 NLRB 1317 (1946). While the Board held in *Ford* that it would thereafter restrict the exclusion of "confidential employees" to those having a confidential relationship to persons responsible for formulation of the employer's labor policy, it reaffirmed its prior, *unrestricted*, exclusionary policy regarding "managerial employees."

In *Ford*, the employer contended that certain time study personnel were either "managerial" or "confidential", and on either basis should be excluded from a unit of office clerical employees. With respect to "managerial employees", the Board stated:

> "We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be 'managerial', in that they express and make operative the decisions of management." *Id.*, at 1322.

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7. Board's brief at Page 13, n. 6.

8. See, *e.g.*, *Julian P. Friez & Sons; Spicer Mfg. Co.; Hudson Motor Car Co.; Vulcan Corp.*, and those cases cited in Footnotes 3 and 4, *supra.*

About "confidential employees", the Board said the following:

> "We have also excluded from units of rank and file employees, persons who, in the regular course of their duties, have access to confidential data bearing directly upon the employees' labor relations, designating them as 'confidential'. However, upon re-appraisal, we are of the opinion that this definition is too inclusive and needlessly precludes many employees from bargaining collectively with other workers having common interests. Consequently, it is our intention to limit the term 'confidential', so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." *Id.*, at 1322.

Had the Board been of the belief that its practice with regard to "managerial employees" required a similar re-evaluation and restriction only to exclude those who themselves "exercise 'managerial' functions in the field of labor relations", it presumably would have so stated.[8] Thus, when Congress enacted the Taft-Hartley amendments in 1947, the Board's policy with regard to managerial personnel was one of exclusion from the coverage by the Act, and the exclusion was not limited only to those who formulate and effectuate their employers' labor policies but extended to those whose duties involved purely business matters as well.

B. The Taft-Hartley Amendments.

Prior to the 1947 amendments, the Board's treatment of one category of management personnel,—supervisors,—exhibited far less consistency that did its policy with respect to those

8. As noted above, the Board found in *Ford* that, based on their duties, the time study employees involved were neither managerial nor confidential. Of course, the factual finding that the duties of the employees at issue did not involve formulation, determination or effectuation of management policies, nor the exercise of independent discretion in the performance of those duties is not a rejection of the standard itself but, rather, a consistent application of it. In fact, the Board's conclusion is supported by its finding that the time-study personnel were merely engaged in routine fact-finding duties through the means of time and motion studies.

managerial persons such as buyers, expeditors, and commercial representatives who formulate or effectuate commercial policies and act as representatives of the employer in dealing with the public.[9] The Board's "policy" with regard to supervisory personnel reached this Court for resolution in *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485 (1947). Reaction to that decision compelled Congress to overturn it by amending the Act to exclude "supervisors" from coverage.[10]

The five to four majority of this Court held in *Packard* that, since the term "employee" as defined in the Wagner Act[11] was virtually unrestricted so as to include "any" employee, the Board was not precluded from finding a unit of foremen to be appropriate. Justice Douglas, joined by Chief Justice Vinson and Justice Burton, dissented. Rejecting the Board's contention, Justice Douglas wrote:

> "For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application." 330 U. S. at 494.

Justice Douglas was of the view that if Congress had intended such a fundamental change in basic industrial philosophy as

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9. The Board had held that foremen were entitled to organize in an independent union. *Union Colleries Coal Co.*, 41 NLRB 961 (1942). Then it was held that even a separate unit of supervisory personnel would not be appropriate for the purposes of collective bargaining. *Maryland Drydock Co.*, 49 NLRB 733 (1943). Finally, in *Packard Motor Co.*, 64 NLRB 1212 (1945) the Board reversed itself and again held that foremen were entitled to form their own union. This latter decision reached this Court, as discussed herein.

10. See, H. R. Rep. No. 245, 80th Cong., 1st Sess. 13-14, 17 (1947) and S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947).

11. Section 2(3), 49 Stat. 449, 450, 29 U. S. C. Section 152.

that which would result from granting those within the management class the right to self-organization, it would have left a clear and unmistakable trace of that purpose. Reviewing the legislative history of the Wanger Act, he observed that the reports and debates were completely barren of any reference to the collective bargaining problems of supervisory personnel and concluded that Congress could not, therefore, have intended the result reached by the majority.

Congress' response to *Packard,* the exclusion of "supervisors" from coverage by the Act, did not contain that portion of Justice Douglas' dissent relating to the organization of other management personnel. Nor do the debates and reports on the 1947 amendments express any Congressional concern that legislation was needed with respect to the Board's policy concerning "managerial" employees. The Court below reviewed this legislative history and interpreted Congressional silence as a recognition that there were other persons clearly more "managerial" than those involved in labor relations; that it was inconceivable that the Board would treat such personnel as employees; and, therefore, that it was not necessary to enact legislation excluding them.

The Second Circuit's interpretation is consistent with the sound principle that the courts "should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation.[12] The overriding purpose of the 1947 Act was to "reconcile and, insofar as possible, equalize the power of competing economic forces within the society in order to encourage the making of voluntary agreements governing labor management relations and prevent industrial strife. . . . Its purpose is not artificially to create or manufacture new economic forces."[13]

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12. *N. L. R. B.* v. *Wheeling Electric Co., supra,* at 787, citing *Haberman* v. *Finch,* 418 F. 2d 664, 666 (CA 2, 1969).

13. *Pittsburg Plate Glass Co.* v. *N. L. R. B.,* 427 F. 2d 936, 946 (CA 6, 1970) and cases cited therein.

Justice Douglas, in *Packard*, had viewed the Board's policy with respect to "supervisors" as an artificial creation which was contrary to the philosophy underlying the Act. Congress acted to correct that artificiality.

The Board's hindsight analysis herein creates such an artificial entity by drawing the line not between the forces of management and labor but within the management group itself. Nothing could be more contrary to the express purpose of the Act.[14] The Board never accorded "managerial" employees the right to organize prior to the 1947 amendments. However, the Board now asserts that despite its practice to the contrary, "managerial" employees have always been covered by the Act; and, therefore, Congressional silence constitutes approval of the view it now takes. The Eighth Circuit responded to the Board's interpretation by stating:

> "While not controlling, the Court is entitled to give considerable weight to the construction of a statute by the administrative agency entrusted with execution when that statute has been subsequently considered by Congress and not materially amended. This is especially true here where Congress enacted an amendment excluding supervisors from coverage after they had been included by Board interpretation but did not make reference to 'managerial employees' who had not been so included. *N. L. R. B.* v. *North Arkansas Electric Cooperative, Inc., supra,* at 607. (Footnotes omitted.)

In short, Congress was silent with respect to the Board's practice because that practice was not contrary to the purposes of the Act. The Board's contention here, however, involves an artificial restructuring of that practice that is contrary to Congressional intent. The further contention of the Board that

14. See, Sec. 1, Labor Management Relations Act 1947, 29 U. S. C. Section 141 and See, National Labor Relations Act, 29, U. S. C. Section 151, declaring Congress' conviction that free collective bargaining and the prevention of industrial strife can only be accomplished if the forces of labor and management recognize the other's legitimate rights.

Congress was mistaken as to the true nature of Board policy with respect to "managerial" employees is belied by the Board's own continued adherence to this "mistaken" policy after 1947. Moreover, the Board's contention is contrary to sound policy and principle.

One of the purposes underlying the Talft-Hartley amendments was to give effect to the recognized rights of management. Management's legitimate goal is to operate the Employer's business and control allocation of resources—both human and technological—in order to obtain a level of acceptable profitability. In pursuit of the goal, management must be accorded the right to formulate and determine its commercial and business policies unhindered by Union interference. The unionization of those who formulate and exercise discretion in making critical business judgments would have such an interfering effect on the ability of the Company to function and thus maintain its profitability.

The needs of management require that managerial personnel have total freedom to function on the Company's behalf on its own terms. Unionization of managerial personnel would impose restrictions upon their conduct as a result of any terms and conditions contained in a collective bargaining agreement. Management further requires an undivided loyalty on the part of those responsible for making decisions and formulating policies in all respects—not merely from those involved in labor or personnel matters. The mere fact of unionization of such personnel would result in a necessarily divided loyalty. The limited restriction on the organization of managerial employees here urged by the Board fails to respect these fundamental managerial prerogatives recognized in the Act. The language in the concurring opinion of Justices Stewart, Douglas and Harlan in *Fibre-Board Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964), 225-226 is particularly apt in this respect:

"It is possible that . . . Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act."

C. Board Policy Subsequent to the Taft-Hartley Amendments.

The history of the Board's treatment of "managerial" employees after the passage of the Taft-Hartley amendments leaves no doubt that its practice continued to be one of excluding such personnel from the Act's coverage even though their duties were unrelated to labor or personnel relations.

Shortly after the 1947 amendments, the Board stated that its policy had been unaffected by the recent enactment. In *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320 (1947) the Board refused to exclude store managers from a store-wide unit because their limited duties and responsibilities made them neither supervisory nor managerial. The Board rejected the contention of supervisory status because the managers had no authority with respect to hire, discharge or discipline. In response to the contention that they were "managerial", the Board stated:

"The determination of 'managerial', like the determination of 'supervisory' is to some extent necessarily a matter of the degree of authority exercised. We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as 'managerial' employees, executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer, *and have excluded such managerial employees from bargaining units.* Matter of *Ford Motor Company, Chicago Branch,* 66 N. L. R. B. 1317. (Emphasis added)

"We believe that the Act, as amended, contemplates the continuance of this practice."

This practice of excluding "managerial" personnel from the right to statutory self-organization continued to encompass such persons as buyers who had no relationship with their employer's labor policies. For example, in *Denver Dry Goods Co.*, 74 NLRB 1167 (1947) assistant buyers were excluded from a unit of sales, clerical and office employees because their duties were "more closely identified with management." They were required to compile good sales records as an example to other employees, assisted buyers in the selection of merchandise and took over buyers' duties when the buyers were absent.

Similarly, in *Denton's, Inc.*, 83 NLRB 35 (1949) personnel with buying functions were excluded from a unit of sales employees because they contacted vendors in the performance of their duties even though some of them spent only twenty per cent of their time in buying and the rest in selling. Also, in *American Locomotive Co.*, 92 NLRB 115 (1950), buyers were excluded from an office and clerical because they were authorized to negotiate for credit and made purchases for the employer in an amount of six million dollars a year. The Board held that such personnel could *"not be accorded bargaining rights under the Act." Id.*, at 117.

The Board, in support of its newly enunciated rule, contends, of course, that managerial personnel such as those in the above cases were not really excluded from the right of statutorily-aided self-organization but were merely excluded from the larger units because they lacked a sufficient interest to be included. The fact that they were excluded from larger units reflects only the fact that the cases arose in that context and the petitioners did not seek a separate unit of those "managerial" employees; however, in *Swift & Co.*, 115 NLRB 752 (1956) the Board ruled squarely on the propriety of granting the right to representation to a unit consisting wholly of "managerial" employees, adhering to its prior practice as expressed, for example, in *Yale & Towne Mfg. Co., supra.*

The personnel at issue in *Swift* were buyers—procurement drivers—who kept supplies of eggs and poultry coming into the employer's plant and exercised discretion in meeting competitors' prices. They had nothing to do with labor or personnel matters, but the Board found their duties were an "exercise of a managerial prerogative." The petitioning unit sought, alternatively, a separate unit confined to those employees.

In reliance upon *the same legislative history* that it here urges in support of its contrary contention, the Board there categorically stated:

> "We are of the opinion that such a unit is not appropriate. It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act and deny the Petitioners' alternative request." *Id.*, at 753-4 (Footnotes omitted)

Thus, from the very inception of the Act and continuing for approximately 30 years, the Board consistently excluded from the right to union representation those personnel who exercised managerial functions in purely business related areas, and not only those who exercised responsibility in the formulation of labor or personnel policies.

The Board repudiates its clear statement of policy set forth in *Swift* by contending that that case was an aberration and a "sweeping and inaccurate" statement of its practice.[15] This contention is patently without merit. The Board's statement of policy in *Swift* is consistent with both its pre and post 1947 practice and the proper interpretation of Congressional intent with respect to that practice.[16] Rather, *Swift* is said to be an

15. Board's brief at 27.

16. See, *Spicer Mfg. Corp., supra; Hudson Motor Car Co., supra; Yale & Towne Mfg. Co., supra; Ford Motor Co., supra,*

"aberration" because it cannot be explained away by the Board in a manner consistent with the view it now urges on this Court. In addition to its overruling of *Swift*, the Board also wishes now to re-write history.

First, the Board contends that its policy was not as it was in fact.[17] Next, the Board argues that Congress failed to enact legislation because it approved non-existent policy under the mistaken belief as to what that practice really was.[18] Finally, the Board concludes that *Swift*, which merged the Board's practice in fact with a clear statement of that practice, was inaccurate. In this respect, it is worthy to note that in its first petition for enforcement in the *North Arkansas* case,[19] the Board, citing a whole litany of authority, including *Swift*, which it now attempts to explain away or repudiate, clung to the very principle that it now asks this Court to reject. There, the Board argued that it had always excluded "managerial" personnel *"from the protection of the Act"*. The Board further stated its basis for the policy:

> "This exclusionary practice rests on the premise that the functions and interests of such individuals are more closely allied with those of management than with production workers, and therefore they are not truly 'employees' within the meaning of Section 2(3) of the Act, as read in conjunction with Section 2(2)" [defining employer].[20]

Further, the various Circuit Courts of Appeals, called upon to interpret the Board's practice, have viewed it as properly excluding from coverage of the Act not only those managerial personnel involved in labor relations, but all other managerial

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Palace Laundry Dry Cleaning Corp., supra; Swift & Co., supra; N. L. R. B. v. *Wheeling Electric Co., Inc. supra; N. L. R. B.* v. *North Arkansas Electric Cooperative, Inc., supra.*

17. Subpart A above.

18. Subpart B above.

19. 412 F. 2d 324 (CA 8, 1969).

20. 446 F. 2d 602, 605, citing the Board's brief.

personnel as well. A review of those decisions[21] reveals that there have evolved two independent tests to determine managerial status: (1) whether the employee is "so closely related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer on the one hand and his fellow workers on the other" and (2) "whether the employee is formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties." *Illinois Journal-Register, Inc.* v. *N. L. R. B.*, 412 F. 2d 37, 41 (CA 7, 1969).

The first test concerns itself with "managerial" employees who are involved with policies bearing on labor relations, resulting in a potential and serious conflict of interest. However, contrary to the Board's urgings, this first test is not, and has never been, the exclusive measure of managerial status. The second test, as applied by the Courts as well as previously by the Board itself, questions whether the individual's functions in *other* areas of managerial responsibility exempt him from the Act's coverage.

For example, in *N. L. R. B.* v. *Illinois Journal Register, supra,* at issue was the "managerial" status of certain district newspaper circulation personnel. To determine whether these personnel might be managerial under the first test, the court looked to see what concern, if any, they had with the employees' labor relations policy. However, to determine whether the circulation personnel qualified under the second test, the court examined a myriad of non-labor related duties, such as: the handling of customer complaints; adjusting and remitting sales receipts; participation in circulation campaigns; attending sales

21. See, *International Ladies Garment Workers Union* v. *N. L. R. B.*, 339 F. 2d 116 (CA 2, 1964); *Retail Clerks International Association* v. *N. L. R. B.*, 336 F. 2d 642 (CA DC, 1966); *Illinois State Journal-Register, Inc.* v. *N. L. R. B.*, 412 F. 2d 37 (CA 7, 1969); *Westinghouse Electric Corporation* v. *N. L. R. B.*, 424 F 2d 1151 (CA 7, 1970)

meetings; recommending discounts for delivery routes; contacting news dealers on behalf of the Employer; leasing space to serve as substations within their districts; and making purchases. Similarly, in *Westinghouse Electric Corp.* v. *N. L. R. B., supra,* the court, under the second test, examined the duties of certain engineers relating to purely technical matters and to the authority of the engineers to pledge the employers credit. Thus, the courts have recognized that, under the Act, persons should properly be excluded from coverage as "managerial" employees whose duties or functions on behalf of management were not limited to the creation or effectuation of personnel or labor relations policies.

D. The Board May Not Reinterpret the Act to Suit a Change in Policy Without Sound Basis for That Change; the Board Has Shown No Such Basis Here.

The National Labor Relations Act reflects the studied will of Congress as to what this country's labor-management policies shall be. Once enacted, the statute does not change unless the Congress determines that a change is needed. The Board, on the other hand, is merely the instrument for enforcing the Act and is not free to reverse a practice of 30 years by merely taking a revisionist view of history and reinterpretating the Act in accordance with that view. Such a reversal must have a sound basis.

For example, in *N. L. R. B.* v. *Quality Manufacturing Co.,* 481 F. 2d 1018 (CA 4, 1973) the Board attempted to reverse a 25-year practice. Prior to the *Quality* case, the Board had never found that an employer's refusal to allow an employee union representation at an investigatory interview constituted a violation of Section 8(a)(1) of the Act. The Board reversed its view in *Quality*[22] and offered no justification for this reversal other than that "after reflection" the Board felt that the em-

22 195 NLRB No. 42 (1972).

ployer's conduct constituted a "serious violation" of the Act. In response to the Board's contention the Fourth Circuit stated:

> "It is clear beyond question, however, that the Board has no power to alter or rearrange employer-employee relations to suit its very whim. Rather, the Board can only determine whether the Act has been violated. And it would appear that in the entire history of the law as developed above, the management prerogative of conducting an investigatory interview such as Quality attempted here has not been considered a violation of the Act." *N. L. R. B.* v. *Quality Manufacturing Co., supra,* at 1025.

The Seventh Circuit reached the same conclusion and refused enforcement of a Board order involving the same policy reversal at issue in *Quality* in *Mobil Oil Corp.* v. *N. L. R. B.*, 482 F. 2d 842 (CA 7, 1973).

During the present term, this Court had occasion to review a practice which the Board changed after a lengthy period of time in *N. L. R. B.* v. *Savair Manufacturing Co.*, ... U. S. ....., Daily Labor Report No. 242 (BNA, December 17, 1973). Involved was the Board's reversal of its position regarding whether a union's offer to waive initiation fees to those employees who signed a union recognition form prior to a Board-conducted election interfered with the principle of "fair and free choice of bargaining representatives by employees" guaranteed by Section 9 of the Act. In 1954 the Board held that such an offer constituted interference with employees' selection in a Board conducted election.[23] Subsequently, the Board reversed itself merely on the basis of its re-evaluation that it was "completely illogical to characterize as improper [the offer of waiver] as inducement or coercion . . .".[24]

Justice Douglas, speaking for the majority in *Savair,* upheld the Circuit Court's order denying enforcement of the Board's

23. *Lobue Bros.*, 109 NLRB 1182 (1954).

24. *DIT-MCO, Inc.*, 163 NLRB 1019, at 1021.

bargaining order,[25] thus rejecting the Board's reversal in policy. Important here is the reason for rejecting the Board's view, and that was the lack of sound basis for the Board's reversal of position. Thus, even in an area admitting to wide latitude and discretion in the exercise of Board expertise, as is the determination as to what conduct might constitute "interference" and "coercion" in the selection of a bargaining agent, the Board is not free to reverse its course without justifiable grounds.[26] Much greater justification must be required for the Board to reverse itself in an area that involves a question of its basic jurisdiction, or statutory coverage, such as the issue involved herein. Particularly significant here is the fact that during the 30 years of consistent exclusion of all managerial employees from coverage, Congress has amended the Act twice, and conceivably could have amended it every year, had it felt the Board's practices were contrary to the legislative will. The Board is not now free to re-write that 30 years without a sound basis. Merely arguing, as the Board does, that it has always given "managerial" employees the Act's protection, in the face of its demonstrable practice to the contrary, is not such a basis.

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25. 470 F. 2d 305 (CA 6, 1973).

26. Justice White, in his dissent in *Savair* recognized that the issue involved the question of "the proper allocation of institutional responsibility between an administrative agency and a reviewing court." However, those Labor Board cases relied on by the dissent did not involve reversal of longstanding policy. *NLRB* v. *A. J. Tower*, 329 U. S. 324 (1945) was concerned with a challenge to the validity of the Board's post-election rule but not with a change in the Board's position with respect to that rule; *NLRB* v. *Waterman S. S. Co.*, 309 U. S. 326, involved a challenge to the Board's interpretation of the statutory language of the Act, but not a reversal of the Board's interpretation of that language; *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759 (1969), discussed *infra* involved the Board's institution of a new rule requiring employers to submit an eligibility list in Board elections, but did not involve a change from a prior position with respect to that tule as is involved here. Insofar as the propriety of the Board's reversal of policy herein is concerned, these cases are of little aid.

E. The Buyers Involved in the Instant Case Qualify for Exclusion as "Managerial" Employees.

Despite the absence of any labor relations function, the employer's buyers in this case are managerial employees properly excludable from the Act's coverage.

As observed by the court below, although the buyers can commit the employer's credit for amounts not to exceed five thousand dollars ($5,000) without concurrence of higher authority, the aggregate amount so pledged over a nineteen month period was in excess of seven million dollars, and one of them alone committed over one million dollars.[27] The discretion possessed by these buyers in this respect is comparable with that enjoyed by buyers in *American Locomotive Co., supra,* and far more extensive than in *Swift & Co., supra.*

Further, where the amount of purchase is $5,000 or less, the buyers have authority to cancel the contract and place the order with an alternate vendor.[28] This exercise of managerial discretion is no less than that which qualified expeditors in *Spicer Mfg. Corp., supra,* for exclusion. Also, on contracts involving the Minute Man project which accounts for seventy percent of the Employer's sales, the buyers work with a "team consisting of supervisory personnel from the engineering, quality assurance, manufacturing and finance departments. . . . Once agreement [on the terms of the contract] is reached, the buyer is responsible for seeing that contracts are complied with and adjusting disputes."[29]

Thus, the buyers involved in the instant case are required to exercise independent and sound business judgments in the performance of duties fundamentally important to the employer's operations. The employer's success or failure as an enterprise depends upon the contractual relationships negotiated, executed

27. 475 F. 2d at 486, n. 1.
28. 475 F. 2d at 487.
29. 475 F. 2d at 486-7.

and administered by these buyers and upon the buyers' total commitment to act in the employer's best interests. Though their duties have no relationship to labor relations or personnel matters, they are, nonetheless, managerial. They should therefore be excluded from coverage under the National Labor Relations Act.

II.

THE LOWER COURT'S HOLDING THAT THE INSTANT CASE MUST BE REMANDED FOR RULE-MAKING PROCEEDINGS IS IN ERROR AND MUST BE REVERSED.

The court below was unsure whether the Board's decision in the instant case represented the enunciation of a legally erroneous new rule excluding from the Act's coverage only those "managerial" employees whose duties involved them in labor relations matters, or whether the Board applied its prior standard of excluding all "managerial" employees, but merely found, as a factual matter, those persons in issue not truly "managerial". The Court, therefore, concluded that the case must be remanded to the Board. The Court further held that if the Board were here establishing a new "rule" for the treatment of managerial personnel, it was precluded from doing so in an adjudicatory proceeding but must, upon remand, hold rule-making hearings in accordance with the provisions of Section 4 of the Administrative Procedures Act.[30]

The Chamber respectfully disagrees with the court's holding in this respect. It is the *amicus*' view that the Board did enunciate a new and legally erroneous rule in this case, but its action, though requiring reversal, does not require it to accept a remand for conducting rule-making hearings.

The Second Circuit's holding rests in part on its uncertainty as to the basis for the Board's decision in this case. The Court, therefore, felt that judicial determination as to the legality of the

30. 5 U. S. C. Sec. 553.

newly enunciated rule was precluded by this Court's first *Chenery* opinion. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943). In *Chenery*, this Court, in discussing the principles governing reviewability of agency action, stated:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order cannot stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Id.*, at 94.

However, the basis for the Board's decision herein is not uncertain. The Board did not dispute the Employer's contention that Bell's buyers were "managerial". Rather, the Board concluded that despite the fact that the buyers might be "managerial", they were nonetheless entitled to union representation.[31] This is the thrust of the Board's whole argument, and there exists no uncertainty that the Board's decision rests on this basis. Therefore, the barrier of uncertainty does not here exist to preclude this Court from ruling on the legality of the Board's determination, and there is no need for a remand on that basis.[32]

However, the issue of uncertainty is only one of the reasons for the Second Circuit's holding. The second, and perhaps more critical, is the court's view that the Board could not properly fromulate a new policy, having the effect of a rule to be

31. See 197 NLRB No. 30, *supra*.

32. However, it is recognized that even if this Court declares the Board's newly enunciated policy invalid, a remand might be required to determine whether Bell's buyers are nevertheless "managerial" under the proper test.

prospectively applied in all cases, in an adjudicatory proceeding but, rather, is required to conduct rule-making hearings in accordance with Section 4 of the Administrative Procedure Act. The Chamber similarly disagrees with this argument and, in this respect, agrees with the Board that rule-making would be an inappropriate procedure for deciding the issue herein.[33]

The basis for the Second Circuit's view is that the Board, if it chooses, as it has here done, to reverse a policy of long standing respecting its treatment of "managerial" employees,—particularly since the Board had engendered a justifiable contrary belief as to what its practice had been,—is required to engage in rule making as a precondition to effecting such a policy change. The Court relies for its view on an expression of approval of the rule-making process made in the second *Chenery* decision, *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194 (1947) and on the observations of Justice Fortas, speaking for the plurality, and Justices Douglas and Harlan, dissenting, in *N. L. R. B.* v. *Wyman-Gordon Company*, 394 U. S. 759 (1969) regarding the Board's formulation of its *Excelsior* rule.[34]

While it is correct, as noted by the court below, that in *Chenery, supra*, at 202, this Court observed that while "[t]he function of filling the interstices of the [Securities] Act should be performed, as much as possible, through . . . quasi-legislative promulgation of rules to be applied in the future . . .", this Court further noted that ". . . any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many specialized problems which

33. To be sure, the Chamber, as argued in the preceding sections of this brief, disagrees with the Board's theory in support of its decision and order and that the policy as set forth therein is a proper exercise of its duties under the National Labor Relations Act; however, we agree, for the reasons set forth here, that an adjudicatory proceeding is a proper procedure for resolving the question presented.

34. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

arise." Thus, this Court's expression in *Chenery* of a preference for rule-making proceedings over adjudicatory proceedings as a means for formulating agency rules or policy, must be taken as qualified; and, whether or not a particular change in policy might more properly proceed by *ad hoc* litigation would depend upon whether any standard that might result through quasi-legislative proceedings would contribute to the administrative process in dealing with the problem.

Insofar as this particular change in Board policy is concerned, it is not unlike many others which have preceded it to the Courts of Appeals[35] and to this Court[36] out of adjudicatory proceedings. This particular issue, like others which arise under the National Labor Relations Act, is not most efficiently and completely resolved through rule-making because any rule that might result would of necessity have to be sufficiently broad to cover not only Bell's buyers, or buyers in general, but also any personnel of any employer subject to the Act alleged to be "managerial". This would be true no matter whether the rule so formulated were, as the Board argues, restricted to labor relations matters, or to all management functions. Under either test, an evidentiary hearing would have to be held in each case to determine whether those persons in issue were within or without the rule. To require the Board to hold hearings to formulate such rule would not contribute to the Board's process in dealing with the issue since a case-by-case determination must be made in any event. Indeed, proceeding by rule-making

35. See, for example, *NLRB* v. *Quality Manufacturing Co., supra,* and *Mobile Oil Corp.* v. *NLRB, supra,* discussed in Subpart D, *supra.*

36. See, for example: *NLRB* v. *Gissel Packing Co.,* 395 U. S. 575 (1969), wherein the Board announced a change in policy for determining whether an employer unlawfully refuses to bargain when presented with a union's claim of majority status for the first time in proceedings before this Court; and *NLRB* v. *Savair Mfg. Co., supra,* where, this term, the Board's reversal of its long-term policy regarding the loyalty of a union's waiver of initiation fees was rejected.

would, under the circumstances, be a wasteful and unnecessary act."

Alternatively, the Board could, after holding hearings, promulgate a narrow and specific set of rules governing particular cases. However, such a set of rules, though perhaps capable of dealing with the buyers at issue here, could not conceivably be broad enough to encompass the myriad duties of all personnel in each plant, store, shop or industry in this country. In short, such rules would make the Board's processes "inflexible and incapable of dealing with many of the specialized problems which arise."

Moreover, *N. L. R. B.* v. *Wyman-Gordon*, does not, as the court below suggests, detract from the conclusion that *ad hoc* litigation is the preferable procedure for resolving issues as the one presented herein. Indeed, it furthers that conclusion.

Wyman-Gordon involved a "rule" in the sense that it could be, and was to be, applied to fit all cases at all times. To require, as the *Excelsior* rule does, that an employer submit to the Board a list of eligible voters, does not involve factual inquiries on a case-by-case basis as does the resolution of the problem here, where findings, conclusions and orders in each case must be developed by evidence and supported by facts,—facts that will vary in every case. This procedure is not "rule-making" although the decisions and orders of the Board become its "policy". Justice Fortas observed the distinction in *Wyman-Gordon* when he noted:

> "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See Friendly, The Federal Administrative Agencies 36-52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are "rules" in the sense that

they must, without more, be obeyed by the affected public." *NLRB* v. *Wyman-Gordon Co., supra,* at 765 (footnote omitted).

Here, the Board's new "rule" is a reversal of policy, and as such, serves as precedent to inform all those concerned that it will act in accordance with its new policy when presented with an allegation of "managerial" status. It is not a command in the sense that it must be obeyed by all persons in the future.[37] The issue of managerial status in each and every case must still be litigated even under the Board's new "rule", unless reversed by this Court.

Accordingly, the Second Circuit's holding that this case must be remanded for rule-making proceedings must be reversed.

37. As pointed out by the Board in its brief at 31, the factor which caused Justice Douglas and Harlan to dissent in *Wyman-Gordon* was not the formulation of the rule itself in *Excelsior,* but, rather, the fact that the Board, by declining to apply it to the parties in *Excelsior,* but only in election proceedings arising thirty days after, appeared to be engaging in rule making without compliance with Section 4 of the Administrative Procedure Act. Here, however, the Board applied the new "rule" to the parties to this proceeding.

CONCLUSION.

For the foregoing reasons, it is urged that the Court affirm the judgment of the Court of Appeals insofar as it concluded that *all* "managerial" employees, whatever the nature of the management duties they perform, are not covered by the National Labor Relations Act and reverse that part of the court's decision remanding this case to the Board for rule-making proceedings.

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